Feb. 12. 1873 22-272 Feb 12

Submitted

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~181~~ 192

RODERICK R. BUTLER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED SEPTEMBER 24, 1873.

Oct. 2. 1873

SUPREME COURT OF THE UNITED STATES.

No. 481.

RODERICK R. BUTLER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

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1 Transcript of the record and proceedings in a cause lately determined in the United States circuit for the eastern district of Tennessee, wherein the United States are plaintiffs and Roderick R. Butler and Ethan A. Sawyers are defendants, viz:

Summons.

The President of the United States of America to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded to summons Roderick R. Butler and Ethan A. Sawyers, if they be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit for the district of East Tennessee, at the court-house in Knoxville, in said State, on the second Monday in January next, then and there to answer unto the United States of a plea that they render to the said United States of America the sum of fifteen thousand dollars, which they owe to and unjustly detain from them; herein fail not, and have you then and there this writ.

Witness the honorable Salmon P. Chase, esq., Chief Justice of the Supreme Court of the United States, this the 2d Monday in July, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the 96.

H. M. AIKEN, *Clerk.*

2 (Endorsed:) No. 458. United States vs. Roderick R. Butler & Ethan A. Sawyers. This summons was issued on the 10 day of October, 1871. H. M. Aiken, clerk.

Came to hand same day issued, and executed as to R. R. Butler, and a copy of this writ and copy of declaration delivered to him Oct. 20, 1870.

S. P. EVANS, *U. S. M.*

Came to hand October 24th, 1871, and executed as to E. A. Sawyers, and a copy of this writ and a copy of declaration delivered to him October 25th, 1871, in Jefferson County, Tenn.

D. M. BOYD,
Dep't U. S. Marshal.

Evans' costs, one summons, $2.00; one copy of decl., $2.00. Boyd's costs, one summons, $2.00; one copy of decl., $2.00; 25 miles going, @ 6, $1.50—$5.50.

Declaration.

Circuit court. To January term, 1873.

THE UNITED STATES OF AMERICA,
District of East Tennessee:

The United States of America, plaintiffs, complain of Roderick R. Butler and Ethan A. Sawyers, citizens of said district, defendants, who are here now sued of a plea that they render to the said United States of America the sum of fifteen thousand dollars, ($15,000,) which they owe to and unjustly detain from the plaintiffs.

For that whereas the said defendants, Roderick R. Butler and

3 Ethan A. Sawyers, with Benjamin Bowman Emory, and William Choppin, who are not here now, sued heretofore to wit, on the second day of February, A. D. 1870, at, to wit, in the district aforesaid, by their writing-obligatory, signed with their names and sealed with their seals, a true certified copy of which is here now to the court shown, the date whereof is a certain day and year above named, to wit, the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the United States of America in the full and just sum of fifteen thousand dollars. ($15,000,) so as herein sued for and demanded to be paid to the said plaintiffs, which said writing-obligatory was and is subject to the conditions following, that is to say: That whereas the said Benjamin B. Emory had been pursuant to law appointed collector of internal revenue, for the third district of Miss.; and whereas, under the provisions of the 170th section of an act entitled, "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, the Commissioner of Internal Revenue is authorized in any collection-district where in his judgment the facilities for the procurement and distribution of stamped vellum, parchment, or paper and adhesive stamps are or shall be insufficient, to furnish, supply,
4 and deliver to the collector and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depository thereof, or any postmaster, a suitable quantity or amount of such stamped vellum, parchment, or paper, and adhesive stamps without prepayment therefor; and whereas adhesive stamps had been and was thereafter delivered to said Benjamin B. Emory by virtue of said authority:

Now, therefore, if the said Benjamin B. Emory had made a faithful return, whenever so required, of the moneys received by him for such adhesive stamps as had been and was thereafter delivered to him, and of all quantities and amounts thereof undisposed of whenever required so to do, and had made monthly payments for all quantities and amounts sold and not remaining on hand, and had done and performed all other acts of him required to be done in the premises according to law, then said obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

And the plaintiffs say that the said Benjamin B. Emory, did not make a faithful return whenever so required of the moneys received by him for such adhesive stamps as had been or was thereafter delivered to him, and of all quantities and amounts thereo undisposed
5 of whenever required so to do, nor did said Benjamin B. Emory make monthly payments for all quantities and amounts sold and not remaining on hand, nor did he do and perform all other acts of him required to be done in the premises according to law. And the plaintiffs aver that he, the said Benjamin B. Emory, received large quantities of adhesive stamps; that he sold the same, and received large sums of money therefor, to wit, the sum of fifteen thousand dollars, all which he has been required to make return of and pay over: Whereupon plaintiffs say that the conditions of said writing-obligatory have been broken, and said obligation remains in full force and virtue, and that an action hath accrued to the plaintiffs to have and maintain their said action against said defendants, and to have and recover said sum of fifteen thousand dollars.

Yet said defendants though often requested so to do, and to pay said sum, hath not as yet paid the same or any part thereof, but hitherto and still neglect and refuse to pay the same to the damage of said plaint-

iffs of fifteen thousand dollars, ($15,000,) and therefore they bring this suit.

E. C. CAMP,
U. S. Dist. Att'y Eastern Dist. Tenn.

6 (Endorsed:) No. 458. United States vs. R. R. Butler, E. A. Sawyer. Declaration. Filed Oct. 10, 1871. H. M. Aiken, clerk.

UNITED STATES INTERNAL REVENUE.

Bond.

Know all men by these presents that I, Benjamin B. Emory, of Corinth, State of Mississippi, as principal, and Roderick R. Butler, Ethan A. Sawyer, & William Choppin, as sureties, are held and firmly bound unto the United States of America in the full and just sum of fifteen thousand dollars, money of the United States, to which payment well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this second day of February, in the year one thousand eight hundred and seventy.

The condition of the foregoing obligation is such, that whereas the said Benjamin B. Emory has been pursuant to law appointed collector of internal revenue for the 3d district, Miss.; and whereas under the provisions of the 170th section of an act entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, the Commissioner of Internal Revenue is authorized, in any collection-dis-
7 trict where in his judgment the facilities for the procurement and distribution of stamped vellum, parchment, or paper and adhesive stamps are or shall be insufficient, to furnish, supply, and deliver to the collector and to the assessor of any such district and to any assistant treasurer of the United States or designated depositary thereof, or any postmaster, a suitable quantity or amount of such stamped vellum, parchment, or paper and adhesive stamps, without prepayment therefor; and whereas adhesive stamps have been delivered or hereafter may be delivered to said Benjamin B. Emory by virtue of said authority:

Now, therefore, if the said Benjamin B. Emory shall make a faithful return whenever so required of the moneys received by him for such adhesive stamps as have been or may hereafter be delivered to him, and of all quantities or amounts thereof undisposed of whenever required so to do, and shall make monthly payments for all quantities and amounts sold or not remaining on hand, and shall do and perform all other acts of him required to be done in the premises according to law, then the above obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

BENJAMIN BOWMAN EMORY. [L. S.]
RODERICK R. BUTLER. [L. S.]
ETHAN A. SAWYER. [L. S.]
WILLIAM CHOPPIN. [L. S.]

Signed, sealed and delivered in the presence of us—
RICHARD MCALLISTER &
C. WILEY WELLS.

[Int.-rev. stamp, 25 cents.]

The following instructions must be particularly observed and complied with:

1st. The Christian names must be written in the body of the bond in full and so signed to the bond; and the residence of each signer (town or city, county and State) should be stated after his name in the body of the bond; and if it be in a city or large town, the street and number should be given.

2d. After the words, "has been pursuant to law appointed," insert collector of internal revenue, assessor of internal revenue, assistant treasurer of the United States, U. S. designated depositary, or postmaster, as the case may be.

3d. A seal of wax or wafer to be attached to each signature.

4th. Each signature must be made in the presence of two persons, who must sign their names as witnesses.

5th. Each surety must make and sign an affidavit of the amount he is worth after paying his just debts.

6th. A district judge or attorney of the United States or a clerk of a court of record, under the seal and designation of the court, county, and State, must certify that the sureties are sufficient to pay the penalty of the bond.

7th. The affidavits of the sureties must be taken and signed before an officer authorized to administer oaths generally. The officer must certify that he administered the oath. If the magistrate is not a judge of the United States court, his authority to administer oaths must be certified by the clerk of a court of record having official knowledge of that fact.

8th. Bond to be dated.

9th. There must be three sureties to the bond.

10th. A twenty-cent internal-revenue stamp must be affixed and cancelled; and a five-cent stamp must be affixed to each certificate.

11th. The penal sum must not be less than $500.

(Endorsed:) Internal-revenue stamp bond.

WASHINGTON, D. C.:

I hereby certify that the sureties named in the within bond are sufficient for the penalty thereof.

Feb'y 3d, 1870.

A. B. OLIN,
Justice Sup. Court D. C.

[Int.-rev., 5 cents.]

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT, *September 21st*, 1871.

Pursuant to the act of Congress of the 22d February, 1869, I hereby certify that the annexed is a true copy of an original official bond as internal revenue stamp agent of Benjamin B. Emory, late collector of internal revenue for the third collection-district of Mississippi, dated February 2d, 1870, and on file in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

[SEAL.]

J. F. HARTLEY,
Acting Secretary of Treasury.

Plea.

In circuit court U. S. Jan'y term, 1872.

UNITED STATES
vs.
R. R. BUTLER & E. A. SAWYERS.

And the said defendants, by Houk & Prosser, his attorneys, come and defend the wrong and injury, when, &c., and say they do not owe or detain the said sum of fifteen thousand dollars ($15,000) in plaintiff's declaration mentioned, or any part thereof, in manner and form as the said pl'ff hath in his said declaration complained against them; and of this the said defendants put themselves upon the country.

L. C. HOUK &
A. S. PROSSER,
Att'ys for Def'ts.

(Endorsed: , No. . United States vs. R. R. Butler & E. A. Sawyers. Pleas. Filed Jan'y 23d, 1872. H. M. Aiken, clerk.

Be it remembered that at a circuit court of the United States, began and held for the eastern district of Tennessee, at the court-house
11 in Knoxville, within said district, upon the second Monday, it being the 8th day of January, 1872, the following proceedings were had, to wit:

TUESDAY MORNING, *January* 23, 1872.

Court met pursuant to adjournment. Present, the honorable Connally F. Trigg, judge, &c.

UNITED STATES
vs.
R. R. BUTLER & E. A. SAWYERS. } Debt. No. 458.

This cause is continued until next term of this court as upon affidavit of the defendants.

Affidavit.

THE UNITED STATES
vs.
R. R. BUTLER ET AL. } No. 458.

The defendant R. R. Butler comes and makes oath that, during the last regular term of this court, he was engaged in the public service as a Representative in the Congress of the United States; that he had written to L. C. Houk to look after said case, as his attorney; that he had been unable to confer with his said attorney in regard to making defense to this action; that up to that time he was not himself fully advised as to the facts, so as to be able to inform his attorney with that defeniteness necessary to prepared his defense; that he could
12 not attend said last term of this court in person, owing to his duties as a Representative in Congress; that under these circumstances his then attorneys, Messrs. Houk and Prosser, filed a plea in his behalf, of the "general issue," with a verbal agreement, as defendant

is advised, with the district attorney, that he would be permitted to file such other and further pleas as might be deemed by his counsel as necessary to a proper and legal defense at the present term of the court, so as not to delay; and that he has used all the means at his command to prepare his said case for trial.

And said defendant further states that the suit pending against him is founded on an official bond executed, or purporting to have been executed, by one Emory, with this defendant and others as security thereon; that he never in fact executed or signed any such bond as the one represented by the certified copy filed in this case; that he did sign a blank paper, a bond not yet filled up, and delivered it to said Emory as an escrow, upon the following conditions in substance, that is to say, he signed a blank and delivered it to said Emory with the understanding and agreement that the penalty of said bond was to be filled in at the sum of four thousand dollars, and was not to be delivered to the custody of the Government nor to be used; nor was this defendant to
13 be held bound upon or by said bond until the said Emory should first secure the signatures of two other good securities, with five thousand dollars over and above all liabilities, and who were to be citizens of the city of Washington. Whereas, in fact, the said Emory filled up said bond in the penal sum of fifteen thousand dollars, and delivered the same to the care and custody of the Government, with the intent to bind the said defendant and others without *without* having first procured the required sureties stipulated as aforesaid.

And the said defendant further states that said bond is not his act and deed so as in law to bind him as he is advised, and that he is unable to file his special or additional pleas in this case without inspection of the original bond, and he therefore comes and craves oyer of said original bond, that the same may be read to him, and he may have personal inspection thereof.

He therefore prays that this cause may be continued until the next term of this court, with leave to file additional and special pleas, so as not to delay. This is asked for justice and not for delay.

Affiant further states that the production of the original bond from the Treasury Department upon a copy of which this suit was
14 brought, is not only necessary to enable him to file the additional plea or pleas necessary to his defence, but will be absolutely indispen'able on the trial of the cause to enable the jury, by an inspection thereof, to judge and determine how far it may upon its face furnish evidence in support of his defence. He prays to be allowed to enter a motion for the production of said original bond, and that this affidavit may be received in support of the same.

R. R. BUTLER.

Personally appeared before me R. R. Butler, who, being by me first duly sworn, deposes & says that the statements contained in the above & foregoing instrument are true to the best of his knowledge, information, and belief.

R. R. BUTLER.

Subscribed and sworn to before me Sept. 12, 1872.

H. M. AIKEN, *Clerk.*

(Endorsed:) No 458. The United States vs. R. R. Butler & E. A. Sawyers. Filed Sept. 12, 1872. H. M. Aiken, clerk.

Be it remembered that at a circuit court of the United States begun and held for the eastern district of Tennessee, at the court-house
15 in Knoxville, within said district, and within the sixth circuit, on the second Monday, it being the 8th day of July, 1872, the following proceedings were had, to wit:

Present and presiding the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee.

THURSDAY MORNING, *September* 12, 1872.

The court met pursuant to adjournment. Present, the honorable Connally F. Trigg, judge, &c.

THE UNITED STATES
vs.
RODERICK R. BUTLER & ETHAN A. SAWYERS. } Debt. No. 458.

Came the defendants, by attorney, and crave oyer of the original bond sued on in this cause, and enter a motion for leave to file additional pleas by the next term of this court.

And afterwards, at the said July term, 1872, of said court, the following proceeding, among others, was had, to wit:

FRIDAY MORNING, *September* 13, 1872.

Court met pursuant to adjournment. Present, the honorable Connally F. Trigg, judge, &c.

16 THE UNITED STATES
vs.
RODERICK R. BUTLER & ETHAN A. SAWYERS. } Debt. No. 458.

The defendants having heretofore craved oyer of the original bond sued on in this case, it is ordered that the same be read to them; and thereupon the motion heretofore entered by said defendants, for the continuance of this cause and for leave to file additional pleas by the next term of this court, coming on to be heard, and argument of counsel having been heard thereon, and the matter being fully understood by the court, it is considered by the court that said motion be allowed; this cause continued until the next term, with leave to the defendants to file additional pleas, on or before the first day of the next term, so as not to delay the trial of the cause.

Pleas.

In the circuit court of the United States for the district of East Tennessee.

UNITED STATES OF AMERICA
vs.
R. R. BUTLER, E. A. SAWYERS. } Pleas of R. R. Butler.

And the said Roderick R. Butler, by attorney, comes and defends the wrong and injury when, &c., and craves oyer of the original of the said supposed writing-obligatory in the declaration men-

17 tioned; and also of the condition of said supposed writing-obligatory, and they are read to him in these words:

"Know all these men by these presents that I, Benjamin B. Emory, of Corinth, State of Mississippi, as principal, and Roderick R. Butler, Ethan A. Sawyer, and William Choppin, as sureties, are held and firmly bound unto the United States of America in the full and just sum of fifteen thousand dollars, money of the United States, to which payment well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this second day of February, in the year one thousand eight hundred and seventy.

"The condition of the foregoing obligation is such that whereas the said Benjamin B. Emory has been pursuant to law appointed collector of internal revenue for the 3d district Miss.; and whereas under the provisions of the 170th section of an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864, the Commissioner of Internal Revenue is authorized, in any collection-district, where, in his judgment, the facilities for the procurement and distribution of stamped vellum, parchment, or paper, and adhesive

18 stamps are or shall be insufficient, to furnish, supply, and deliver to the collector and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depositary thereof, or any postmaster, a suitable quantity or amount of such stamped velum, parchment, or paper, and adhesive stamps, without prepayment therefor; and whereas adhesive stamps have been delivered or hereafter may be delivered to said Benjamin B. Emory by virtue of said authority:

"Now, therefore, if the said Benjamin B. Emory shall make a faithful return, whenever so required, of the moneys received by him for such adhesive stamps as have been or may hereafter be delivered to him, and of all quantities or amounts thereof undisposed of whenever required so to do, and shall make monthly payments for all quantities and amounts sold or not remaining on hand, and shall do and perform all other acts of him required to be done in the premises according to law, then the above obligation to be void; otherwise to be and remain in full force and virtue.

"BENJAMIN BOWMAN EMORY. [L. S.]
"RODERICK R. BUTLER. [L. S.]
"ETHAN A. SAWYER. [L. S.]
"WILLIAM CHOPPIN. [L. S.]

"Sealed, signed, and delivered in the presence of us.
"RICHARD M'ALLISTER.
"G. WILEY WAPPES."

[Twenty-five c'ts, (25.) 25 certificate int. rev.]

19 which being read and heard, the said defendant says that on the said second day of February, 1870, when he signed his name and affixed his seal to the said supposed writing-obligatory, the said supposed writing obligatory was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; that said blanks were not filled at the time he so signed and sealed said writing-obligatory, and that there was then no other signature thereto except the signature of the said Benjamin Bowman Emory; that the said Benjamin Bow-

man Emory then and there promised and agreed with this defendant that he, the said Emory, would fill up the blanks in said supposed writing-obligatory with the sum of four thousand dollars, and would procure two additional securities thereto, residents of the District of Columbia, in the United States of America; each of whom was to be worth five thousand dollars clear of all liabilities; that the said supposed writing-obligatory was delivered to the said Benjamin Bowman Emory as an escrow, to be kept by him on the special conditions that he would fill up the blanks therein with the said sum of four thousand dollars and with the names of two additional sureties, residents of the said District of Columbia, and each worth the sum of five thousand dollars clear of all liabilities, and that he, the said Benjamin Bowman Emory, would
20 procure the signatures and seals of the said additional securities to the said supposed writing-obligatory after the same should be so filled up, in which event the said supposed writing-obligatory was to stand and be in full force against this defendant; but if the said additional securities were not procured as aforesaid, and were not severally worth the said sum of five thousand dollars clear of all their liabilities as aforesaid, and if the said supposed writing-obligatory was not filled up with the said sum of four thousand dollars as aforesaid, then the said supposed writing-obligatory should be immediately discharged, annulled, and held for nothing, and returned and redelivered to said defendant; and the said defendant avers that said supposed writing-obligatory was not filled up with the said sum of four thousand dollars, but was filled up with the said sum of fifteen thousand dollars; that it was not filled up with the names of two additional sureties, each worth the sum of five thousand dollars clear of all liabilities, and each resident of the said District of Columbia, but the same was filled up with the names of Ethan A. Sawyer and William Choppin, neither of whom was or is a resident of the District of Columbia, and neither of whom was or is worth the said sum of five thousand dollars clear of all liabilities; and the said defendant further avers that he never ratified or acknowl-
21 edged or in any manner whatever recognized the validity of the said supposed writing-obligatory after the same was so filled up, signed, and sealed as aforesaid, nor did he deliver the same or authorize the said Benjamin Bowman Emory, or any other person whatever, to deliver the same, as the same was so filled up, and signed and sealed, and as the same now appears, either to the United States of America, or to any department officer or authority whatever, of the said United States; and that by reason of the Emory having failed to fill up the blanks in the said supposed writing-obligatory with the said sum of four thousand dollars and with the names of two additional sureties, residents of the said District of Columbia, and each worth the sum of four thousand dollars clear of all their liabilities, and by reason of the same having been filled up as the same is now sued *sued* on as aforesaid, the said writing of the said defendant so delivered to the said Benjamin Bowman Emory became and was wholly discharged, annulled, and vacated; and so the said defendant saith that the said supposed writing-obligatory is not his deed, and of this he puts himself on the country.

THO'S A. R. NELSON,
Att'y for Def't.

This day personally appeared before me, H. M. Aiken, clerk of
22 the circuit court of the United States for the district of East Tennessee, Roderick R. Butler, the defendant named in the fore-

going plea, and made oath in due form of law that the same is true in substance and in fact.

RODERICK R. BUTLER.

Sworn to and subscribed before me this 19th October, 1872, at my office in Knoxville, Tennessee.

H. M. AIKEN.
Clerk, &c.

2d plea.

And the said defendant, by attorney, comes and defends the wrong and injury when, where, &c., and having the original supposed writing-obligatory mentioned in the declaration read as the same is set out upon oyer by him in his first plea above pleaded, for further plea in this behalf, says the plaintiffs in the action aforesaid against him ought not to have and maintain, because he says that the said supposed writing-obligatory is not his act and deed, and of this he puts himself on the country.

NELSON,
Att'y for def't.

This day personally appeared before me, H. M. Aiken, clerk of the said court of the United States for the eastern district of Tennessee, Roderick R. Butler, the defendant named in the foregoing second
23 plea, and made oath in due form of law that said plea is true in substance and in fact.

RODERICK BUTLER.

Sworn to and subscribed before me at my office in Knoxville, Tennessee, this 19th October, 1872.

H. M. AIKEN,
Clerk, &c.

3d plea.

And for further plea in this behalf, the said defendant, by attorney, comes and defends the wrong and injury when, where, &c., and say' the said plaintiffs, their action aforesaid against him, ought not to have and maintain, because he says that the supposed writing-obligatory in the declaration mentioned, a copy from the original of which, produced under the order of this honorable court, is set out upon oyer in the first plea by this defendant above pleaded, was obtained from the said defendant by fraud, covin, and misrepresentation on the part of Benjamin Bowman Emory, the principal in said supposed writing-obligatory, who presented the same to this defendant in blank, as a printed form, without date, and with no filling up whatever, except that the same was signed and sealed by the said Emory, and requested this defendant to sign and seal the same, and that this defendant did sign the said blank printed form on the said second day of February, 1870, upon the false and fraudulent assurance of the said Benjamin Bowman
24 Emory that he, the said Emory, would fill the blanks in said bond with the sum of four thousand dollars, and with the names of said Emory, of this defendant, and of two other sureties, residents of the District of Columbia, and each of said additional sureties to be worth not less than four thousand dollars, clear of all liabilities; but instead of

so filling up said supposed writing-obligatory, he, the said Emory, falsely and fraudulently filled the blanks in the same with the sum of fifteen thousand dolars, and with the names of the said Emory, of this defendant, and of two other sureties, to wit, the said Ethan A. Sawyer and William Choppin, neither of whom resides in the said District of Columbia, and neither of whom was, on the said second day of February, 1870, worth five thousand dollars, clear of all liabilities. And the said defendant avers the he never, in any manner whatever, ratified the said act of the said Benjamin Bowman Emory in so falsely and fraudulently filling up the blanks in said writing-obligatory, and in so procuring sureties who were non-residents of the said District of Columbia, and who were not worth each the said sum of five thousand dollars, clear of all liabilities. Wherefore the said defendant saith that the said supposed writing-obligatory in the said declaration mentioned was and is void in law; and this he, the said defendant, is ready to verify. Where-
25 fore he prays judgment if he ought to be charged with the said debt by virtue of the said supposed writing-obligatory, &c.

NELSON, *Att'y for Def't.*

This day personally appeared before me, H. M. Aiken, clerk of the circuit court of the United States for the eastern district of Tennessee, Roderick R. Butler, the defendant named in the foregoing third plea, and made oath, in due form of law, that the said third plea is true in substance and in fact, and that the three pleas by him above pleaded are not filed for delay merely, but in sincerity and good faith, and because he believes he has a valid defence against the causes of action stated in the declaration.

RODERICK R. BUTLER.

Sworn to and subscribed before me at my office in Knoxville, Tennessee, this 19th October, 1872.

H. M. AIKEN, *Clerk.*

(Endorsed:) Pleas. United States vs. R. R. Butler & others. Filed January 13th, 1873. H. M. Aiken, clerk.

Demurrer to pleas.

Circuit court of the United States for the district of East Tennessee.

UNITED STATES
vs.
RODERICK R. BUTLER AND ETHAN A. SAWYERS.

26 And the said plaintiffs, as to *to* the said pleas of said *of the said* defendant, Roderick R. Butler, by him firstly and thirdly above pleaded, saith that the same, and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining *there* aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same, and this the said plaintiffs are ready to verify.

Wherefore, by reason of the insufficiency of the said pleas in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them.

And the said plaintiffs, according to the form of the statute in such cases made and provided, state and show here to the court the following causes of demurrer to the said first plea, that is to say—

1st. That it does not appear in and by said plea that the plaintiffs had notice, at the time that the bond mentioned and set forth in said plea was delivered and accepted as the official bond of the said B. B. Emory, that the same had been executed by the said defendant
27 in blank, and while the same was not filled up as to the penalty thereof, and the names, dates, and amounts therein, or that the plaintiffs then had notice of the agreement set forth in said plea between the said defendant and said B. B. Emory, or that said agreement had not been complied with by said Emory.

2d. That it appears in and by said plea that the said bond executed and delivered by said defendant as aforesaid was in form and effect a good and valid bond, and the act and deed of said defendant and legally binding upon him, and no matter appears in and by said plea sufficient to avoid or invalidate said bond.

3d. That it appears in and by said plea that the said defendant executed said bond, and delivered the same as his act and deed by the said B. B. Emory, his lawfully constituted agent, and that the said Emory, as the agent of the said defendant, was authorized and empowered to fill up the blanks alleged by said plea to have existed therein, with the penalty of fifteen thousand dollars, and the names, dates, and amounts as in said bond contained.

4th. That it appears in and by said plea that the said defend-
28 ant is estopped to deny that the said bond is his act and deed, and it does not appear thereby that the said defendant was ignorant that said bond had been filled up by said Emory, as alleged in said plea, and delivered to and accepted by the plaintiffs.

5th. That it appears in and by said plea that the said bond was not, in fact and law, delivered by the said defendant to the said Benjamin Bowman Emory as an escrow, and that the said delivery to said Emory, as alleged in said plea, did not, in fact and law, constitute the said writing an escrow.

6th. That it does not appear in and by said plea that any agreement or understanding was had or existed between the plaintiffs and said defendants, that said bond should be filled up in a less penalty than fifteen thousand dollars, or that sureties other than the said defendant should sign the same, having the residence and the qualifications set forth in said plea, or that the plaintiffs were in any way parties or privy to the agreement in that behalf alleged to have been made by and between the said defendant and the said Benjamin Bowman Emory. And also that the said first plea is in other respects informal and insufficient, &c. And the said plaintiffs state and show to the court
29 here the following causes of demurrer to the third plea of said defendant; that is to say—

1st. That it does not appear in and by said plea that the plaintiffs were parties to or had any notice of the fraud alleged in said plea to have been practiced upon said defendant by the said Benjamin Bowman Emory, in regard to the filling up and execution of said bond, or that the plaintiffs were privy to or had notice of the statements, assurances, and representations in said plea alleged to have been made by the said Emory in regard to said bond.

2d. That it appears in and by said plea that the said defendant executed the said bond, and delivered the same as his act and deed, by the said Benjamin Bowman Emory, as his agent, and that the said Emory,

as the agent of said defendant, was authorized and empowered to fill up the blanks alleged in said plea to have existed therein, and to deliver the said bond as the act and deed of the said defendant.

3d. That it appears in and by said plea that the said bond was, in form and effect, a good and valid bond, and legally binding upon the said defendant as his act and deed, and that no matter appears in and by said plea sufficient in law to avoid or invalidate said bond.

30 4th. That it does not appear in and by said plea that the said defendant was ignorant that the said bond had been delivered to and accepted by the plaintiffs as the official bond of said Emory, and that it appears by said plea that the said defendant is estopped to deny that said bond is his act and deed, and also that the said third plea is in other respects uncertain, informal, and insufficient.

Wherefore, by reason of the insufficiency of the said first and third pleas of said defendant in this behalf, the plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c.

And the said plaintiffs, as to the plea of said defendant, by him secondly above pleaded, and whereof he hath put himself upon the country, doth the like.

GEO. ANDREWS,
District Attorney of the United States
for the District of East Tennessee.

(Endorsed:) 458. United States vs. Roderick R. Butler et al. Demurrer to pleas. Filed January 16, 1873. H. M. Aiken, clerk.

31 Be it remembered, that at a circuit court of the United States, began and held for the eastern district of Tennessee at the court-house in Knoxville, within said district, upon the second Monday, it being the 13th day of January, 1873, the following proceedings were had, to wit:

Present and presiding, the honorable H. H. Emmons, United States circuit judge for the sixth circuit, and the honorable Connally F. Trigg, United States district judge for the districts of Tennessee.

MONDAY MORNING, *January* 20, 1873.

Court met pursuant to adjournment. Present, the honorable H. H. Emmons, United States circuit judge for the sixth judicial circuit.

THE UNITED STATES
vs.
RODERICK R. BUTLER & ETHAN A. SAWYER. } Debt. No. 458.

The demurrer heretofore filed by the plaintiff to the first and third pleas of the defendant, R. R. Butler, coming on for argument, and argument of counsel being heard thereon, and the premises being fully seen and understood by the court, it is considered by the court that said demurrer be sustained and pleas for nought held.

32 And thereupon came the district attorney for the United States, and the defendant R. R. Butler, by attorney, and the defendant Ethan A. Sawyer, being called to come into court and defend this suit, came not, but made default, whereupon on motion of the district attorney of the United States, and it appearing to the court that the said defendant, Ethan A. Sawyer, has been duly summoned by the marshal, and served with a copy of the declaration in this case

more than thirty days previous to the commencement of the present term of this court, it is considered by the court that the United States recover of the said defendant the debt in the declaration mentioned, and damages for the detention thereof; but because the same have not been ascertained it is ordered that a jury come to enquire thereof. And thereupon came the following jury, to wit: W'm Fowler, R. H. Armstrong, A. F. Keith, J. H. Lawrence, B. F. Doughty, Sam'l I. Newman, J. J. West, Vincent Myers, G. W. Dame, L. W. Hampton, W. S. Reese, and W. A. Simpson, good and lawful men of the eastern district of Tennessee, who being duly elected, tried, and sworn to try the issue joined between the United States and the defendant Ethan A. Sawyers, upon their oath do say that they find the issue in favor of the United States, and that the said defendants do owe of the debt in the declaration mentioned the sum of three thousand two hundred and fifty-four
33 dollars and twenty-five cents, and also the further sum of two hundred and thirty-two dollars and sixty-seven cents as damages for the detention thereof, making in all the sum of three thousand four hundred and eighty-six dollars and ninety-two cents.

It is therefore considered by the court that the United States recover of the said defendants said sum of three thousand four hundred and eighty-six dollars and ninety-two cents, and also the costs of this cause; for all which let execution issue.

And afterwards, at the said January term, 1873, of said court, the following proceeding among others was had, to wit:

WEDNESDAY MORNING, *January* 29, 1873.

Court met pursuant to adjournment. Present, the honorable H. H. Emmons, United States circuit judge for the sixth judicial circuit, and the honorable Connally F. Trigg, United States district judge for the districts of Tennessee.

THE UNITED STATES
vs.
RODERICK R. BUTLER & ETHAN A. SAWYERS. } Debt. No. 458.

Came the defendant R. R. Butler, by attorney, and enters a
34 motion for a new trial as to him in this cause, which motion coming on for argument, and argument of counsel being heard thereon, and the matter being fully seen and understood by the court, it is considered by the court that said motion be overruled and disallowed.

And afterwards, at the said January term, 1873, of said court, the following proceeding among others was had, to wit:

THURSDAY MORNING, *January* 30, 1873.

Court met pursuant to adjournment. Present, the honorable H. H. Emmons, United States circuit judge for the sixth judicial circuit, and the honorable Connally F. Trigg, United States district judge for the districts of Tennessee.

THE UNITED STATES
vs.
RODERICK R. BUTLER. } Debt. No. 458.

Came the defendant, by attorney, and entered a motion to arrest the

judgment in this case, and by leave of the court filed the following reasons in arrest of judgment, to wit:

UNITED STATES
vs.
R. R. BUTLER.

The defendant R. R. Butler comes and moves the court to arrest the judgment in this case upon the grounds—

35 1st. That it appears upon the face of the record that it is a joint demand on the part of all the parties named in the declaration, to wit, Benjamin B. Emory, Roderick R. Butler, Ethan A. Sawyers, and William Choppin, the first of whom with the last are not sued.

2d. It appears from the record that said cause of action is founded upon a written obligation, in which Benjamin Bowman Emory is principal, Roderick R. Butler, Ethan A. Sawyers, and William Choppin are sureties, who signed and sealed said obligation with their names and seals, and which obligation is joint and several in its terms and conditions, while this action is broug' against an intermediate member of said joint and several obligors, and not against all or each one of them singly.

For the above reasons defendant prays the honorable court to arrest the judgment.

A. S. PROSSER,
Atto. for Def't Butler.

And said motion coming on for argument, and argument of counsel being heard thereon, and the matter being fully understood by the court, it is considered by the court that said motion be overruled and disallowed.

36 *Bill of exceptions.*

UNITED STATES
vs.
R. R. BUTLER.

Be it remembered that on the trial of this case the following evidence was submitted to the jury:

First. The plaintiffs introduced evidence tending to prove that the signature of Roderick R. Butler to the bond mentioned in the declaration was genuine. Plaintiffs then offered to read a certified account, from the Treasury Department, of B. B. Emory, revenue collector for the third collection district of Mississippi. Defendant objected that the account was improperly certified, the Secretary of the Treasury merely certifying as to the character of John Allison, esq., and not as to the authenticity of the transcript. Objection overruled; to the overruling of which defendant excepts.

The following is the certificate:

"TREASURY DEPARTMENT,
"*Register's Office, September 23d,* 1872.

"Pursuant to an act of March 3, 1797, entitled 'An act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys,' I, John Allison, register of the

Treasury Department, do hereby certify that the annexed copies of the reports of the Fifth Auditor of the Treasury, numbered 801, 1053, 1527, 1636, 2133, & 2273, as admitted and certified by the Comptroller upon the account of B. B. Emory, late internal-revenue stamp agent for
37 the third collection district of Mississippi, under his official bond, dated February 2d, 1870, and of the statement of difference thereon, are a transcript from the books and proceedings of the Treasury, and that the copies of the accounts-current of said internal-revenue stamp agent and of his receipts for stamps hereto attached are true copies of the originals on file in this office.

"JOHN ALLISON,
"*Register.*

"Be it remembered that John Allison, esq., who certified the annexed transcript, is now, and was at the time of doing so, Register of the Treasury of the United States, and that full faith and credit are due to his official attestations.

"In testimony whereof I, George S. Boutwell, Secretary of the Treasury of the United States, have hereunto subscribed my name and caused to be affixed the seal of this Department, at the city of Washinton, this twenty-third day of September, in the year of our Lord 1871.

[SEAL U. S. TREASURY.] "GEO. S. BOUTWELL,
"*Secretary of the Treasury.*"

Plaintiffs then rested their case.

Defendant then offered to prove as follows, which was objected to:

38 1st. That at the time defendant Butler signed the bond and affixed his seal to the same, it was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; said blanks were not filled up at the time, and there was no other signature to said bond except the signature of Benjamin Bowman Emory; that said B. B. Emory then and there promised and agreed with this defendant, that if he would sign said bond, in its then condition, that he, B. B. Emory, would fill up the blanks in said bond with the sum of four thousand dollars, and would procure two additional sureties, residents in the District of Columbia, in the United States, each of whom was to be worth five thousand dollars over and above all their liabilities, to sign said bond; and that the said blank bond was then signed and delivered to said Emory with the distinct understanding and agreement that said bond should not be binding upon defendant until the other two sureties, each worth five thousand dollars over and above all their liabilities, should sign the same; said two sureties to be residents of the District of Columbia; and that in the event the said Emory failed to get said two sureties, worth $5,000, and residents of District of Columbia, then, in that event, the said bond was to be returned to defendant
39 and become wholly inoperative, as to him, null and void; and that said writing-obligatory, at the time of the said defendant's signing and sealing the same, was delivered to said Emory, the principal obligor, as an escrow, with the special agreement and understanding that the same was not to be delivered to the plaintiffs or any of its agents or officers until the said two additional securities were procured and the said blanks in said bond filled up in the sum of four thousand dollars.

2d. That defendant never in any manner whatever ratified or ac-

knowledged the validity of said bond after it was filled up in the sum of fifteen thousand dollars, and signed and sealed by the said E. A. Sawyers and William Choppin. Nor did the said defendant authorize the said Emory, or any other person or persons, to deliver the same for him to the plaintiffs as his act and deed otherwise than by signing the same and by delivering to said Emory as aforesaid.

3d. That the defendant, E. A. Sawyers and co-surety on said bond, and William Choppin, the other co-surety, neither of whom reside in the District of Columbia, and both of whom at the date of the signing and sealing of said bond were wholly insolvent and worthless, and that at no time from the said 2d day of February, 1870, up to this date, have either or both of them been worth the said
40 sum of money, ($5,000,) and neither of whom are or have been residents of the District of Columbia at the date of the signing of said bond, or since that date.

4th. That the said Benjamin Bowman Emory obtained the signature of the defendant Butler to said blank bond by false and fraudulent representations as to the amount of said bond, and filled the same up and delivered the same to plaintiffs falsely and fraudulently in the manner aver'ed in the defendant's third plea, and that the defendant never ratified said act in any manner whatever as aver'ed in said plea.

All of which, being objected to by plaintiffs, was rejected by the court; to which action of the court defendant excepted.

This was the evidence in the cause.

And to the action of the honorable court in admitting the said certified account from the Treasury Department in evidence, in refusing to permit the defendant to make the proof which he offered to make as hereinbefore stated in the trial, and to the action of his honor in refusing to make absolute the rule for a new trial, and in over'uling the reasons in arrest of judgment, the defendant, by his counsel, excepts in law, and tenders this his bill of exceptions, which he prays may
41 be signed and sealed by the honorable court and made part of the record in this case, which is accordingly done this 31 day of January, 1873.

H. H. EMMONS.
Circuit Judge.

(Endorsed:) No. 458. Bill of exceptions. The United States vs. R. R. Butler & E. A. Sawyers. Filed February 1st, 1873. H. M. Aiken, clerk.

Writ of error.

UNITED STATES OF AMERICA.

The President of the United States to the honorable judge of the circuit court of the United States for the district of East Tennessee, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States and Roderick R. Butler, a manifest error hath happened, to the great damage of the said Roderick R. Butler, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
42 the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and the proceedings aforesaid being inspected, the said Supreme Court, may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 26th day of February, in the year of our Lord one thousand eight hundred and seventy-three.

H. M. AIKEN,
Clerk of the Circuit Court of the United States for Eastern District of Tennessee.

(Endorsed:) No. 458. Writ of error. The United States vs. R. R. Butler & E. A. Sawyer. Filed February 26, 1873. H. M. Aiken, clerk.

Citation.

THE UNITED STATES OF AMERICA.

To The United States of America, honorable George Andrews, district attorney for the United States for the eastern district of Tennessee, greeting:

You are hereby cited and admonished to be and appear at a
43 Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Tennessee, wherein Roderick R. Butler is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Connally F. Trigg, judge of the district court for the eastern district of Tennessee, this 24th day of February, in the year of our Lord one thousand eight hundred and seventy-three.

CONNALLY F. TRIGG,
District Judge.

(Endorsed:) Citation. The United States vs. R. R. Butler & E. A. Sawyers. Filed March 5, 1873. H. M. Aiken, clerk.

I hereby accept and acknowledge due service on me of the within citation this 26th day of February, 1873.

GEO. ANDREWS,
U. S. District Att'y for District of East Tennessee.

Appeal-bond.

Supreme Court of the United States.

44 UNITED STATES
vs.
RODERICK R. BUTLER.

Know all men by these presents that we, Roderick R. Butler and , of Johnson County, Tennessee, are held and firmly bound unto the United States of America in the sum of seven thousand dollars, to be paid to the said United States, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 18th day of February, 1873.

Whereas the above-named Roderick R. Butler hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of East Tennessee:

Now, therefore, the condition of this obligation is such, that if the above-named Roderick R. Butler shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make
45 good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

RODERICK R. BUTLER, [SEAL.]
By A. S. PROSSER, *Att'y.*
FRED. SLIMP. [SEAL.]
L. W. HAMPTON. [SEAL.]
ISAAC RAMBO. [SEAL.]

Sealed and delivered in presence of—

(Endorsed:) No. 458. Appeal-bond. The United States vs. R. R. Butler & E. A. Sawyers. Filed February 18, 1873. H. M. Aiken, clerk.

Believing the security sufficient, I approve the foregoing bond.
CONNALLY F. TRIGG,
U. S. District Judge.

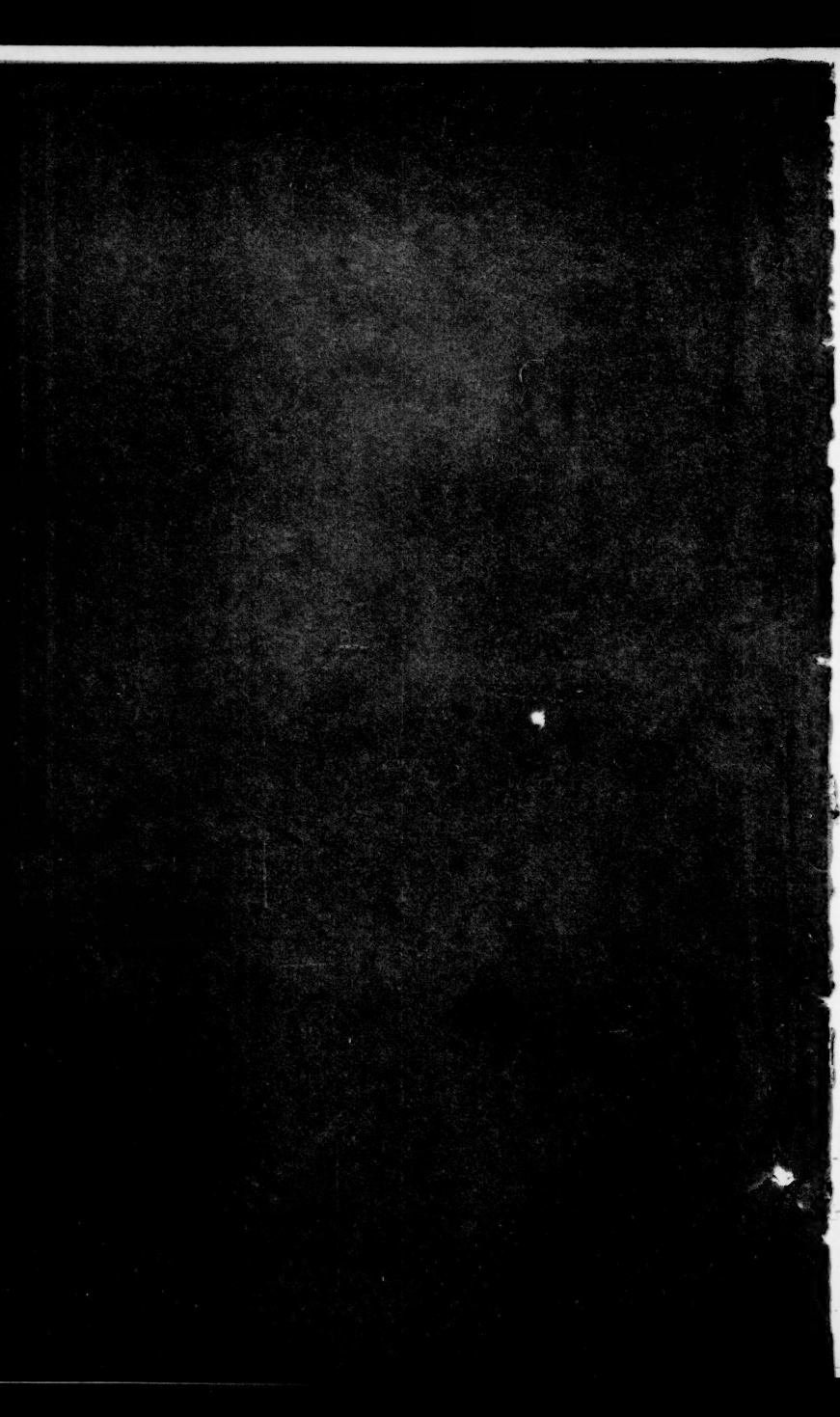
EASTERN DISTRICT OF TENNESSEE, *ss:*

I, H. M. Aiken, clerk of the United States circuit court for said district, do hereby certify that the foregoing is a full, true, and perfect copy of the record and proceedings in a cause lately determined in said court, wherein the United States are plaintiffs and Roderick R. Butler and Ethan A. Sawyers defendants, as the same appear on file and of record in my office.

Given under my hand & the seal of said court, at Knoxville, this Sept. 11, 1873.

H. M. AIKEN, *Clerk.*

(Indorsement on cover:) No. 481. Roderick R. Butler, plaintiff in error, vs. The United States. E. Tennessee C. C. U. S. Filed 24th September, 1873.



IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Filed September 24, 1873.

RODERICK R. BUTLER,
vs.
THE UNITED STATES.

The action below was commenced in the above-named court 2d Monday of July, 1871, and was brought against two of the alleged makers of a certain bond, to wit, against the plaintiff in error, Roderick R. Butler and Ethan A. Sawyer, both of whom were served with process.

This bond on which action is brought is on pages one and two of the record, and purports to be an official bond to the United States by Benj. B. Emory, as Collector of Internal Revenue for the 3d District of Mississippi; is joint and several in its terms; is made by said Emory as principal, and by the plaintiff, R. R. Butler, Ethan A. Sawyer, and Wm. Choppin as his securities; is dated 2d Feb., 1870; is in the penalty of $15,000, and purports to have been taken to secure the moneys arising from and account for the stamps, &c., delivered to Emory under the 170th sect. of the act of 30th June, 1864.

The declaration is found on the 1st, 2d, 3d, and 4th pages of the record; and the breach of the bond assigned is the failure of Emory to account.

The defendant, Butler and Sawyer, at Jan'y Term, 1872, filed a joint plea that they did "not owe," &c. See top of 5th page of record.

Plaintiff, Butler, at same Jan'y term, 1872, made motion and affidavit for continuance, craved oyer of original bond, and asked leave to file additional pleas. See record, 5 and 6.

At July term, on 13th Sept., 1872, leave was given to defendants below to file additional pleas, and cause was continued. See record, page 7.

The plaintiff in error, Butler, on such leave, 13th Jan'y, 1873, filed the following three additional pleas, namely: (See pages 7 to 11 of record.)

Pleas.

In the Circuit Court of the United States for the District of East Tennessee.

UNITED STATES OF AMERICA
vs.
R. R. BUTLER, E. A. SAWYERS. } Pleas of R. R. Butler.

And the said Roderick R. Butler, by attorney, comes and defends the wrong and injury when, &c., and craves oyer of the original of the said supposed writing-obligatory in the declaration mentioned; and also of the condition of said supposed writing-obligatory, and they are read to him in these words:

"Know all men by these presents that I, Benjamin B. Emory, of Corinth, State of Mississippi, as principal, and Roderick R. Butler, Ethan A. Sawyer, and William Choppin, as sureties, are held and firmly bound unto the United States of America in the full and just sum of fifteen thousand dollars, money of the United States, to which payment well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents,

sealed with our seals, and dated this second day of February, in the year one thousand eight hundred and seventy.

"The condition of the foregoing obligation is such that whereas the said Benjamin B. Emory has been pursuant to law appointed collector of internal revenue for the 3d district Miss.; and whereas under the provisions of the 170th section of an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864, the Commissioner of Internal Revenue is authorized, in any collection-district where, in his judgment, the facilities for the procurement and distribution of stamped vellum, parchment, or paper, and adhesive stamps are or shall be insufficient, to furnish, supply, and deliver to the collector and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depositary thereof, or any postmaster, a suitable quantity or amount of such stamped vellum, parchment, or paper, and adhesive stamps, without prepayment therefor; and whereas adhesive stamps have been delivered or hereafter may be delivered to said Benjamin B. Emory by virtue of said authority:

"Now, therefore, if the said Benjamin B. Emory shall make a faithful return, whenever so required, of the moneys received by him for such adhesive stamps as have been or may hereafter be delivered to him, and of all quantities or amounts thereof undisposed of whenever required so to do, and shall make monthly payments for all quantities and amounts sold or not remaining on hand, and shall do and perform all other acts of him required to be done in the premises according to law, then the above obligation to be void; otherwise to be and remain in full force and virtue.

"BENJAMIN BOWMAN EMORY [L. S.]
"RODERICK R. BUTLER, [L. S.]
"ETHAN A. SAWYER, [L. S.]
"WILLIAM CHOPPIN. [L. S.]

"Sealed, signed, and delivered in the presence of us.
"RICHARD M'ALLISTER,
"G. WILEY WAPPES."

[Twenty-five c'ts, (25¢ 25 certificate int. rev.]

Which being read and heard, the said defendant says that on the said second day of February, 1870, when he signed his name and affixed his seal to the said supposed writing-obligatory, the said supposed writing-obligatory was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; that said blanks were not filled at the time he so signed and sealed said writing-obligatory, and that there was then no other signature thereto except the signature of the said Benjamin Bowman Emory; that the said Benjamin Bowman Emory then and there promised and agreed with this defendant that he, the said Emory, would fill up the blanks in said supposed writing-obligatory with the sum of four thousand dollars, and would procure two additional securities thereto, residents of the District of Columbia, in the United States of America, each of whom was to be worth five thousand dollars clear of all liabilities; that the said supposed writing-obligatory was delivered to the said Benjamin Bowman Emory as an escrow, to be kept by him on the special conditions that he would fill up the blanks therein with the said sum of four thousand dollars, and with the names of two additional sureties, residents of the said District of Columbia, and each worth the sum of five thousand dollars clear of all liabilities, and that he, the said Benjamin Bowman Emory, would procure the signatures and seals of the said additional securities to the said supposed writing-obligatory after the same should be so filled up, in which event the said supposed writing-obligatory was to stand and be in full force against this defendant; but if the said additional securities were not procured as aforesaid, and were not severally worth the said sum of five thousand dollars clear of all their liabilities as aforesaid, and if the said supposed writing-obligatory was not filled up with the said sum of four thousand dollars as aforesaid, then the said supposed writing-obligatory should be immediately discharged, annulled, and held for nothing, and returned and redelivered to said defendant; and the said defendant avers that said supposed writing-obligatory was not filled up with the said sum of four thousand dollars, but was filled up with the said sum of fifteen thousand

dollars; that it was not filled up with the names of two additional sureties, each worth the sum of five thousand dollars clear of all liabilities, and each resident of the said District of Columbia, but the same was filled up with the names of Ethan A. Sawyer and William Choppin, neither of whom was or is a resident of the District of Columbia, and neither of whom was or is worth the said sum of five thousand dollars clear of all liabilities; and the said defendant further avers that he never ratified or acknowledged or in any manner whatever recognized the validity of the said supposed writing-obligatory after the same was so filled up, signed, and sealed as aforesaid, nor did he deliver the same or authorize the said Benjamin Bowman Emory, or any other person whatever, to deliver the same, as the same was so filled up, and signed and sealed, and as the same now appears, either to the United States of America, or to any department officer or authority whatever of the said United States; and that by reason of the Emory having failed to fill up the blanks in the said supposed writing-obligatory with the said sum of four thousand dollars, and with the names of two additional sureties, residents of the said District of Columbia, and each worth the sum of four thousand dollars clear of all their liabilities, and by reason of the same having been filled up as the same is now, sued [sued] on as aforesaid the said writing of the said defendant so delivered to the said Benjamin Bowman Emory became and was wholly discharged, annulled, and vacated; and so the said defendant saith that the said supposed writing-obligatory is not his deed, and of this he puts himself on the country.

THO'S A. R. NELSON,
Att'y for Def't.

This day personally appeared before me, H. M. Aiken, clerk of the Circuit Court of the United States for the district of East Tennessee, Roderick R. Butler, the defendant named in the foregoing plea, and made oath in due form of law that the same is true in substance and in fact.

RODERICK R. BUTLER.

Sworn to and subscribed before me this 19th October, 1872, at my office in Knoxville, Tennessee.

H. M. AIKEN,
Clerk, &c.

2d Plea.

And the said defendant, by attorney, comes and defends the wrong and injury when, where, &c., and having the original supposed writing-obligatory mentioned in the declaration read as the same is set out upon oyer by him in his first plea above pleaded, for further plea in this behalf, says the plaintiffs in the action aforesaid against him ought not to have and maintain, because he says that the said supposed writing-obligatory is not his act and deed, and of this he puts himself on the country.

NELSON,
Att'y for Def't.

This day personally appeared before me, H. M. Aiken, clerk of the said court of the United States for the eastern district of Tennessee, Roderick R. Butler, the defendant named in the foregoing second plea, and made oath in due form of law that said plea is true in substance and in fact.

RODERICK BUTLER.

Sworn to and subscribed before me at my office in Knoxville, Tennessee, this 19th October, 1872.

H. M. AIKEN,
Clerk, &c.

3d Plea.

And for further plea in this behalf, the said defendant, by attorney, comes and defends the wrong and injury when, where, &c., and say the said plaintiffs, their action aforesaid against him, ought not to have and maintain, because he says that the supposed writing-obligatory in the declaration mentioned, a copy from the original of which, produced under the order of this honorable court,

is set out upon oyer in the first plea by this defendant above pleaded, was obtained from the said defendant by fraud, covin, and misrepresentation on the part of Benjamin Bowman Emory, the principal in said supposed writing obligatory, who presented the same to this defendant in blank, as a printed form, without date, and with no filling up whatever, except that the same was signed and sealed by the said Emory, and requested this defendant to sign and seal the same, and that this defendant did sign the said blank printed form on the said second day of February, 1870, upon the false and fraudulent assurance of the said Benjamin Bowman Emory that he, the said Emory, would fill the blanks in said bond with the sum of four thousand dollars, and with the names of said Emory, of this defendant, and of two other sureties, residents of the District of Columbia, and each of said additional sureties to be worth not less than four thousand dollars, clear of all liabilities; but instead of so filling up said supposed writing obligatory, he, the said Emory, falsely and fraudulently filled the blanks in the same with the sum of fifteen thousand dollars, and with the names of the said Emory, of this defendant, and of two other sureties, to wit, the said Ethan A. Sawyer and William Choppin, neither of whom resides in the said District of Columbia, and neither of whom was, on the said second day of February, 1870, worth five thousand dollars, clear of all liabilities. And the said defendant avers that he never, in any manner whatever, ratified the said act of the said Benjamin Bowman Emory in so falsely and fraudulently filling up the blanks in said writing obligatory, and in so procuring sureties who were non-residents of the said District of Columbia, and who were not worth each the said sum of five thousand dollars, clear of all liabilities. Wherefore the said defendant saith that the said supposed writing obligatory in the said declaration mentioned was and is void in law; and this he, the said defendant, is ready to verify. Wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said supposed writing obligatory, &c.

NELSON, *Att'y for Def't.*

This day personally appeared before me, H. M. Aiken, clerk of the Circuit Court of the United States for the eastern district of Tennessee, Roderick R. Butler, the defendant named in the foregoing third plea, and made oath, in due form of law, that the said third plea is true in substance and in fact, and that the three pleas by him above pleaded are not filed for delay merely, but in sincerity and good faith, and because he believes he has a valid defence against the causes of action stated in the declaration.

RODERICK R. BUTLER.

Sworn to and subscribed before me at my office in Knoxville, Tennessee, this 19th October, 1872.

H. M. AIKEN, *Clerk*.

(Indorsed:) Pleas. United States *vs.* R. R. Butler and others. Filed January 13th, 1873. H. M. Aiken, clerk.

The following demurrer was filed to the first and third of said pleas:

Demurrer to Pleas.

Circuit Court of the United States for the district of East Tennessee.

UNITED STATES
vs.
RODERICK R. BUTLER AND ETHAN A. SAWYERS.

And the said plaintiffs, as to *to* the said pleas of said *of the said* defendant, Roderick R. Butler, by him firstly and thirdly above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining th*e*re aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same, and this the said plaintiffs are ready to verify.

Wherefore, by reason of the insufficiency of the said pleas in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them.

And the said plaintiffs, according to the form of the statute in such cases made and provided, state and show here to the court the following causes of demurrer to the said first plea, that is to say—

1st. That it does not appear in and by said plea that the plaintiffs had notice, at the time that the bond mentioned and set forth in said plea was delivered and accepted as the official bond of the said B. B. Emory, that the same had been executed by the said defendant in blank, and while the same was not filled up as to the penalty thereof, and the names, dates, and amounts therein, or that the plaintiffs then had notice of the agreement set forth in said plea between the said defendant and said B. B. Emory, or that said agreement had not been complied with by said Emory.

2d. That it appears in and by said plea that the said bond executed and delivered by said defendant as aforesaid was in form and effect a good and valid bond, and the act and deed of said defendant and legally binding upon him, and no matter appears in and by said plea sufficient to avoid or invalidate said bond.

3d. That it appears in and by said plea that the said defendant executed said bond, and delivered the same as his act and deed by the said B. B. Emory, hislawfully constituted agent, and that the said Emory, as the agent of the said defendant, was authorized and empowered to fill up the blanks alleged by said plea to have existed therein, with the penalty of fifteen thousand dollars, and the names, dates, and amounts as in said bond contained.

4th. That it appears in and by said plea that the said defendant is estopped to deny that the said bond is his act and deed, and it does not appear thereby that the said defendant was ignorant that said bond had been filled up by said Emory, as alleged in said plea, and delivered to and accepted by the plaintiffs.

5th. That it appears in and by said plea that the said bond was not, in fact and law, delivered by the said defendant to the said Benjamin Bowman Emory as an escrow, and that the said delivery to said Emory, as alleged in said plea, did not, in fact and law, constitute the said writing an escrow.

6th. That it does not appear in and by said plea that any agreement or understanding was had or existed between the plaintiffs and said defendants, that said bond should be filled up in a less penalty than fifteen thousand dollars, or that sureties other than the said defendant should sign the same, having the residence and the qualifications set forth in said plea, or that the plaintiffs were in any way parties or privy to the agreement in that behalf alleged to have been made by and between the said defendant and the said Benjamin Bowman Emory. And also that the said first plea is in other respects informal and insufficient, &c. And the said plaintiffs state and show to the court here the following causes of demurrer to the third plea of said defendant; that is to say—

1st. That it does not appear in and by said plea that the plaintiffs were parties to or had any notice of the fraud alleged in said plea to have been practiced upon said defendant by the said Benjamin Bowman Emory, in regard to the filling up and execution of said bond, or that the plaintiffs were privy to or had notice of the statements, assurances, and representations in said plea alleged to have been made by the said Emory in regard to said bond.

2d. That it appears in and by said plea that the said defendant executed the said bond, and delivered the same as his act and deed, by the said Benjamin Bowman Emory, as his agent, and that the said Emory, as the agent of said defendant, was authorized and empowered to fill up the blanks alleged in said plea to have existed therein, and to deliver the said bond as the act and deed of the said defendant.

3d. That it appears in and by said plea that the said bond was, in form and effect, a good and valid bond, and legally binding upon the said defendant as his act and deed, and that no matter appears in and by said plea sufficient in law to avoid or invalidate said bond.

4th. That it does not appear in and by said plea that the said defendant was ignorant that the said bond had been delivered to and accepted by the plaintiffs as the official bond of said Emory, and that it appears by said plea that the said defendant is estopped to deny that said

bond is his act and deed, and also that the said third plea is in other respects uncertain, informal, and insufficient.

Wherefore, by reason of the insufficiency of the said first and third pleas of said defendant in this behalf, the plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c.

And the said plaintiffs, as to the plea of said defendant, by him secondly above pleaded, and whereof he hath put himself upon the country, doth the like.

GEO. ANDREWS,
District Attorney of the United States
for the District of East Tennessee.

Indorsed: 458. United States vs. Roderick R. Butler et al. Demurrer to pleas. Filed January 16, 1873. H. M. Aiken, clerk.

Upon and after such demurrers the following action and proceeding were had in the cause by the Court, as appears by said record. (See pages 13 and 14.)

MONDAY MORNING, *January* 20, 1873.

Court met pursuant to adjournment. Present, the Honorable H. H. Emmons, United States circuit judge for the sixth judicial circuit.

THE UNITED STATES
vs.
RODERICK R. BUTLER & ETHAN A. SAWYER. } Debt. No. 458.

The demurrer heretofore filed by the plaintiff to the first and third pleas of the defendant, R. R. Butler, coming on for argument, and argument of counsel being heard thereon, and the premises being fully seen and understood by the Court, it is considered by the Court that said demurrer be sustained and pleas for nought held.

And thereupon came the district attorney for the United States, and the defendant, R. R. Butler, by attorney, and the defendant, Ethan A. Sawyer, being called to come into court and defend this suit, came not, but made default,

whereupon, on motion of the district attorney of the United States, and it appearing to the Court that the said defendant, Ethan A. Sawyer, has been duly summoned by the marshal, and served with a copy of the declaration in this case more than thirty days previous to the commencement of the present term of this court, it is considered by the Court that the United States recover of the said defendant the debt in the declaration mentioned, and damages for the detention thereof; but because the same have not been ascertained it is ordered that a jury come to inquire thereof. And thereupon came the following jury, to wit: Wm. Fowler, R. H. Armstrong, A. F. Keith, J. H. Lawrence, B. F. Doughty, Sam'l I. Newman, J. J. West, Vincent Myers, G. W. Dame, L. W. Hampton, W. S. Rees, and W. A. Simpson, good and lawful men of the eastern district of Tennessee, who being duly elected, tried, and sworn to try the issue joined between the United States and the defendant, Ethan A. Sawyers, upon their oath do say that they find the issue in favor of the United States, and that the said defendants do owe of the debt in the declaration mentioned the sum of three thousand two hundred and fifty-four dollars and twenty-five cents, and also the further sum of two hundred and thirty-two dollars and sixty-seven cents as damages for the detention thereof, making in all the sum of three thousand four hundred and eighty-six dollars and ninety-two cents.

It is therefore considered by the court that the United States recover of the said defendants said sum of three thousand four hundred and eighty six dollars and ninety-two cents, and also the costs of this cause, for all which let execution issue.

And afterwards, at the said January term, 1873, of said court, the following proceeding among others was had, to wit:

WEDNESDAY MORNING, *January* 29, 1873.

Court met pursuant to adjournment. Present the Honorable H. H. Emmons, United States circuit judge for the sixth judicial circuit, the Honorable Connally F. Trigg, United States district, judge for the districts of of Tennessee.

THE UNITED STATES
vs.
RODERICK R. BUTLER & ETHAN A. SAWYERS. } Debt. No. 458.

Came the defendant R. R. Butler, by attorney, and enters a motion for a new trial as to him in this cause, which motion coming on for argument, and argument of counsel being heard thereon, and the matter being fully seen and understood by the court, it is considered by the court that said motion be overruled and disallowed.

And afterwards, at the said January term, 1873, of said court, the following proceeding among others was had, to wit:

THURSDAY MORNING, *January* 30, 1873.

Court met pursuant to adjournment. Present, the Honorable H. H. Emmons, United States circuit judge for the sixth judicial circuit, and the Honorable Connally F. Trigg, United States district judge for the districts of Tennessee.

THE UNITED STATES
vs.
RODERICK R. BUTLER. } Debt. No. 458.

Came the defendant, by attorney, and entered a motion to arrest the judgment in this case and by leave of the court filed the following reasons in arrest of judgment to wit:

UNITED STATES
vs.
R. R. BUTLER.

The defendant, R. R. Butler, comes into court and moves to arrest the judgment in this case upon the grounds—

1st. That it appears upon the face of the record that it is a joint demand on the part of all parties named in the Declaration, to wit, Benjamin B. Emory, Roderick R. Butler, Ethan A. Sawyers, and William Choppin, the first of whom with the last are not sued.

2d. It appears from the record that said cause of action

is founded upon a written obligation, in which Benjamin Bowman Emory is principal, Roderick R. Butler, Ethan A. Sawyers, and William Choppin are sureties, who signed and sealed said obligation with their names and seals, and which obligation is joint and several in its terms and conditions, while this action is broug' against an intermediate member of said joint and several obligors, and not against all or each one of them singly.

For the above reasons defendant prays the honorable court to arrest the judgment.

A. S. PROSSER,
Atto. for Def't Butler.

And said motion coming on for argument, and argument of counsel being heard thereon, and the matter being fully understood by the court, it is considered by the court that said motion be overruled and disallowed.

Bill of Exceptions.

UNITED STATES
vs.
R. R. BUTLER.

Be it remembered that on the trial of this case the following evidence was submitted to the jury:

First. The plaintiffs introduced evidence tending to prove that the signature of Roderick R. Butler to the bond mentioned in the declaration was genuine. Plaintiffs then offered to read a certified account, from the Treasury Department, of B B. Emory, Revenue Collector for the third collection district of Mississippi. Defendant objected that the account was improperly certified, the Secretary of the Treasury merely certifying as to the character of John Allison, Esq., and not as to the authenticity of the transcript. Objection overruled; to the overruling of which defendant excepts.

The following is the certificate:

"TREASURY DEPARTMENT,
"REGISTER'S OFFICE, *September 23d*, 1872.

"Pursuant to an act of March 3, 1797, entitled 'An act to provide more effectually for the settlement of accounts

between the United States and receivers of public moneys,' I, John Allison, Register of the Treasury Department, do hereby certify that the annexed copies of the reports of the Fifth Auditor of the Treasury, numbered 801, 1053, 1527, 1636, 2133, & 2273, as admitted and certified by the Comptroller upon the account of B. B. Emory, late internal-revenue stamp agent for the third collection district of Mississippi, under his official bond, dated February 2d, 1870, and of the statement of difference thereon, are a transcript from the books and proceedings of the Treasury, and that the copies of the accounts-current of said internal-revenue stamp agent and of his receipts for stamps hereto attached are true copies of the originals on file in this office.

"JOHN ALLISON,
"*Register.*

"Be it remembered that John Allison, Esq., who certified the annexed transcript, is now, and was at the time of doing so, Register of the Treasury of the United States, and that full faith and credit are due to his official attestations.

"In testimony whereof I, George S. Boutwell, Secretary of the Treasury of the United States, have hereunto subscribed my name and caused to be affixed the seal of this Department, at the city of Washington, this twenty-third day of September, in the year of our Lord 1871.

"GEO. S. BOUTWELL,
[SEAL U. S. TREASURY.] "*Secretary of the Treasury.*"

Plaintiffs then rested their case.

Defendant then offered to prove as follows, which was objected to:

1st. That at the time defendant Butler signed the bond and affixed his seal to the same, it was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; said blanks were not filled up at the time, and there was no other signature to said bond except the signature of Benjamin Bowman Emory; that said B. B. Emory then and there promised and agreed

with this defendant that if he would sign said bond, in its then condition, that he, B. B. Emory, would fill up the blanks in said bond with the sum of four thousand dollars, and would procure two additional sureties, residents in the District of Columbia, in the United States, each of whom was to be worth five thousand dollars over and above all their liabilities, to sign said bond; and that the said blank bond was then signed and delivered to said Emory with the distinct understanding and agreement that said bond should not be binding upon defendant until the other two sureties, each worth five thousand dollars over and above all their liabilities, should sign the same; said two sureties to be residents of the District of Columbia; and that in the event the said Emory failed to get said two sureties, worth $5,000, and residents of District of Columbia, then, in that event, the said bond was to be returned to defendant and become wholly inoperative, as to him, null and void; and that said writing obligatory, at the time of the said defendant's signing and sealing the same, was delivered to said Emory, the principle obligor, as an escrow, with the special agreement and understanding that the same was not to be delivered to the plaintiffs or any of its agents or officers until the said two additional securities were procured and the said blanks in said bond filled up in the sum of four thousand dollars.

2d. That defendant never in any manner whatever ratified or acknowledged the validity of said bond after it was filled up in the sum of fifteen thousand dollars, and signed and sealed by the said E. A. Sawyers and William Choppin. Nor did the said defendant authorize the said Emory, or any other person or persons, to deliver the same for him to the plaintiffs as his act and deed otherwise than by signing the same and by delivering to said Emory as aforesaid.

3d. That the defendant, E. A. Sawyers and co-surety on said bond, and William Choppin, the other co-surety, neither of whom reside in the District of Columbia, and both of whom at the date of the signing and sealing of said bond were wholly insolvent and worthless, and that at no time from the said 2d day of February, 1870, up to

this date, have either or both of them been worth the said sum of money, ($5,000,) and neither of whom are or have been residents of the District of Columbia at the date of the signing of said bond, or since that date.

4th. That the said Benjamin Bowman Emory obtained the signature of the defendant Butler to said blank bond by false and fraudulent representations as to the amount of said bond, and filled the same up and delivered the same to plaintiffs falsely and fraudulently in the manner aver'ed in the defendant's third plea, and that the defendant never ratified said act in any manner whatever as aver'ed in said plea.

All of which, being objected to by plaintiffs, was rejected by the court; to which action of the court defendant excepted.

This was the evidence in the cause.

And to the action of the honorable court in admitting the said certified account from the Treasury Department in evidence, in refusing to permit the defendant to make the proof which he offered to made as hereinbefore state in the trial, and to the action of his honor in refusing to make absolute the rule for a new trial, and in over'uling the reasons in arrest of judgment, the defendant, by his counsel, excepts in law, and tenders this his bill of exceptions, which he prays may be signed and sealed by the honorable court and made part of the record in this case, which is accordingly done this 31 day of January, 1873.

H. H. EMMONS,
Circuit Judge.

(Indorsed:) No. 458. Bill of exceptions. The United States vs. R. R. Butler & E. A. Sawyers. Filed February 1st, 1873. H. M. Aiken, clerk.

Upon this record the plaintiff assigns the following as error appearing therein, for which he prays revisal of said judgment:

1. The Court erred in sustaining the demurrers to the said first and third pleas by the plaintiff in error, R. R. Butler.

2. The Court erred in overruling the said motion for a new trial.

3. The Court erred in overruling the said motion in arrest of judgment.

4. The Court erred in admitting the said evidence offered by the United States, and objected to by the said Butler, as disclosed by the said bill of exceptions.

5. The Court erred in excluding said evidence offered by said Butler to the jury, and objected to by the United States.

6. The Court erred in rendering a judgment on the verdict of said jury against the plaintiff in error, when said jury was not sworn upon the issue joined between the United States and said Butler, but was only sworn upon the issue between the said Sawyer and the United States, as appears by said record, such issues being wholly different.

7. The Court erred in rendering a judgment in said cause against the plaintiff in error, Butler, ; whereas, in law it should have been rendered for the said Butler, and against the United States.

And for other manifest errors appearing in said record.

ARGUMENT FOR BUTLER.

Up to the decision of the case of Dair *vs.* United States, (16 Wallace, 1,) I think that the state of the law, upon the questions presented by the above-named demurrer, may be safely set down as that indicated by Chief Justice Marshall in the case of United States *vs.* Nelson. (2 Brock, 64.) The syllabus of that case accurately indicates the facts upon which it arose and the law as it was found in the case. The syllabus is in the following words:

" A and B consented to become securities in an official bond. A printed paper in the usual form, prepared for official bonds, was signed by them. At the time A and B signed it, all the parts which are usually *written*, in-

cluding the penalty, the names of the obligors, &c., were in blank, and C, the principal, had not yet signed it. A and B signed it with a perfect knowledge of the purposes for which it was designed, but blanks were afterwards filled up in their absence and without any *express* authority from the sureties, and the bond so executed was accepted by the proper authorities of the United States as the official bond of C, with A and B as his sureties.

"Held that such bond is not obligatory on A and B."

The case at bar presents to this court, amongst others, the identical question decided by the Chief Justice in the case of United States *vs.* Nelson, and unless this decision be overruled, the judgment of the Court below must in this case be revised. In other words, the present case presents to this court the direct questions, (1) whether a bond under seal, executed by securities when the penalty was blank, and which blank was afterward filled up in the absence of the security, and without any delivery by him after the filling up, may be delivered to the obligee, after such filling up, and without any new act or assent of the security, so as to bind such surety; and (2) whether, if, in the case just stated, the security would be bound, he would still be so bound if the surety, when he so signed such blank bond, delivered it to the principal in the bond on the express agreement that the blank penalty should be filled with four thousand dollars, and the instrument executed by designated other securities worth a designated amount of property, before there was to be *any* delivery to the obligee; and, if not so filled up and signed, it was to be returned to the security; and, if, in fraud and violation of this agreement not to deliver, the bond is filled up for fifteen thousand dollars and is not signed by such securities, and is then delivered to the obligee in violation of the prohibition to deliver, the surety would still be bound.

We think that United States *vs.* Nelson answers both of the above questions squarely in the negative. We think the latter question receives an equally explicit answer in Duncan *vs.* United States, (7 Pet., 448,) if the language of the Court there employed should, in principle, be here applied. That language is: "It is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, *or when one security has signed on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen.*"

How far these cases and these principles of the common law, declared by McLean to be "too well settled to be controverted," are overruled by Dair *vs.* the United States, is the inquiry presented by the record so far as that record relates to the judgment upon the demurrer.

We submit that the following propositions are not passed upon by Dair *vs.* United States, and which must be affirmed before this judgment on demurrer can be sustained.

1. That *essential* parts of a sealed instrument—and which are both uncertain and unfixed by the parts which are written at the time of signing—may be in blank at the time the surety signs and seals, and may be added afterward without the presence or new assent of surety, and the sealed instrument may then be delivered so as to bind, without any new delivery by surety after completion of bond.

2. That not only may the thing last stated be done, but also that this essential blank may be filled up in fraud and violation of an *express* agreement with the surety that there was no delivery of the bond, and was to be none of any bond, except one where this essential blank (which fixes the maximum of the liability) was to be filled with four thousand dollars.

I say these two propositions are not decided in Dair *vs.* United States; and they *could* not be, simply because the bond in that case was *complete in every part at the signing;* and, hence, had the court attempted to decide either of the foregoing points it would have been *obiter* but which the court did not attempt to do.

Hence, this case brings the court to the question whether that principle of the common law which requires the essential parts of sealed instruments to be present at their execution, shall be still further overruled in the supposed interest of some public policy, and in obedience to an equitable doctrine of estoppel *in pais;* and whether that doctrine shall be pushed to the extent of not only allowing essential blanks to be filled after sealing, but also to be filled and delivered in contravention of express agreement, (admitted by the demurrer,) that the filling up and the delivery which were made should never be made.

To *this* extent, I have said, the case of Dair *vs.* United States does not go, and I can find no case which does.

Whether the *principle* decided in the last named case, arising out of the doctrine of equitable estoppel, will require the court to go so far is, perhaps, the only point touching the matter presented by the demurrer to which this brief need allude.

It is, of course, self-evident that the doctrine of estoppel asserted in Dair *vs.* United States cannot be pushed to the extent of asserting that a blank paper, signed and sealed by a surety with the understanding that an official bond might be written thereover, and which was afterward so written, and received by the obligee in ignorance of the history of its making, shall still be held a valid bond. I think it safe to assume the courts cannot go so far. If not, then what is to be the boundary between those *imperfections* of sealed instruments which they may have at

date of execution, and yet be capable of being filled and delivered, as binding, to an innocent obligee, and those *imperfections* which cannot be supplied after signing?

I submit that, at the utmost, this doctrine of estoppel cannot be safely pushed beyond allowing the *mere formal and certain, and non-essential parts, such as names, dates, and the like, to be inserted after signing* in the case of those important and solemn instruments, which our common and statute law still requires shall be sealed; or sealed and acknowledged instruments. And I further submit that the penalty of such bonds is not a mere formal, or certain, or non-essential part of such instrument, which may safely be left to rest in and be supplied by parol.

And on the matter of the public policy which distinguishes between these sealed and acknowledged instruments, and those not required to be so executed, I need only say that the difference between them, viewed in this light of public policy, is not a merely technical one; but, on the other hand, is a difference precisely as substantial in kind, and as important in degree, as that which leads the States, and the Congress, and the regulations made under acts of Congress, to compel seals, and witnesses, and acknowledgments to be had before certain instruments shall be effectual; and which leads these laws to wholly dispense with such solemnities, in execution, in the case of other instruments. Is there any court, or any body, who would dream that deeds, or incumbrances for lands, or last wills or official bonds, ought to be allowed the same sort of execution as a promissory note? Is there no sound or century-tried "public policy" which approves the wisdom of this distinction made by the law as to the solemnities which shall be observed in the execution of these various classes of instruments?

That there is such a difference will, of course, not be

disputed: and it can just as little be disputed that wise public policy commands that every essential part of such instruments, required by the law to be sealed and witnessed, &c., shall be present when these acts of execution and attestation occur; and that no *essential* part shall be left to the perjuries, the litigations, the frauds, and the uncertainties inevitably coming from this being allowed to be supplied afterwards by means of parol proofs.

Upon this very point, and in a case essentially like the present, I find the Supreme Court of Massachusetts employing language which, I think, will strongly commend itself to the approval of this court. In Burns and wife *vs.* Lynde (6 Allen, 312) the court says:

"In respect to agreements *which do not relate to real estate* it is highly useful that a class of instruments should exist to which persons may resort with feelings of confidence that they shall not be liable to be varied or controlled by parol evidence. The importance of these *formalities* is greatly increased by the fact that parties are now made competent witnesses. The *convenience* which men might occasionally find in leaving blanks in sealed instruments to be filled up after delivery *would be but a slight compensation for the evils which would follow the abrogation of the ancient rules of the common law.*"

The act of breaking down that principle which requires every *essential* part of a deed to be present when it is executed is surely very different from and a far more dangerous step (as is so well pointed out by the court in Burns vs. Lynde, *supra*,) than is that one taken in the case of Dair. In the last case the party bound had executed, *in full and* with every required solemnity, *every word* by which the court held him bound; and the court only held that, when he had done all *that*, it would, as against an innocent obligee, be dangerous and work a fraud to

permit him, as against that complete instrument so by him executed and intrusted to his agent, to escape his bond by showing a *parol* agreement, unknown to the obligee, by which his agent was not to deliver the bond till another signed. It will be observed that the very same principle of public policy which tended to prohibit the proof in the Dair case of the condition tends in this case to prohibit the insertion of material terms in a deed after execution. That principle is the prohibition of resort to parol proofs to show what particular obligations are when the law requires these obligations to exist only in deed.

Next: I submit that the penalty of a bond is not such mere formal part of the instrument as that it may be left blank at execution and filled afterwards like the date or name of obligee may be.

On this point it seems to me only necessary to repeat what Chief Justice Marshall says in U. S. vs. Nelson, (2 Brock, 72,) where, in speaking of this identical distinction between filling the blank left for a name and one left for the penalty of a bond, he says: "He" (Parsons, in Smith vs. Crocker, 5 Mass. 538) "lays down his principle in a case 'where a blank is to be filled by inserting particular *names* or *things*;' *that is, where the blank is to be filled up in one manner only. But this principle does not apply to a blank to be filled up with a sum of money, which sum is not precisely fixed.*"

How supremely essential that part of the bond was in our case, which was blank at execution, is indicated by the fact that the filling up resorted to in this case increased the liability of the surety more than three times above what, when they signed, it was agreed they should assume. Certainly that blank was neither one certain, at the date of execution, as to the amount of its filling, nor non-essential as to its effect on the liability.

Let it be carefully noted that this bond was not, like official bonds for discharge of *all* official duties, and where "conditions" would somewhat indicate the scope of the liability, and where, by usage and inference, (implied from the act of signing *such* "conditions,") there might be some show of authority to hold that by the signing of such "conditions" covering *all* official acts there was license to fill the penalty at *any* amount. Even in such a case we deny that such a bond would, on principle or any binding or high authority, be good. But much less is it good in this case where the securities might, *under the law*, arrange with their principal to be bound for *any* amount of stamps from five hundred dollars to any other, and such bond could, *under the law*, be taken, and the stamps deliv ered limited to such amount.

In such a case the fixing of the penalty of the bond is *every thing*, and the "conditions" of the bond are relatively insignificant, and show nothing as to the extent of the danger incurred. In effect it is a bond identical with one securing the repayment of money loaned or deposited, and the penalty sustains the same relation to the essence of the bond as the sum secured by a mortgage sustains to the essence of the mortgage.

Hence if this blank may be left, in such a security as this, and be filled after execution, then it will be scarce a step's travel the court will be required to go in order to hold that instruments required by the law and public policy to be signed, sealed, and acknowledged before witnesses, may be signed on a blank sheet of paper, and then official bonds be written over them, and witnessed, and be held good, and all this be allowed because public policy requires that United States officers, who are commanded to take no bonds except those complete at their execution, and attested by two witnesses at their exe-

cution, shall be exempt from doing so essential and so easy a duty as seeing to it that the law is complied with.

Again, another point raised by the demurrer which we deem necessary to note is, that even could such a blank as this be filled, after signing and in the absence of the surety, without new delivery, and thus become binding by reason of the *implied* authority arising from the act of signing, or in virtue of *express* authority agreed on and proved by parol, still that will not sustain the judgment upon this demurrer. I submit that it will not, because here the demurrer admits that the delivery to Emory, the principal, was with authority to fill up with but four thousand dollars, and that it was expressly agreed that this should be the amount, and no more.

Now the extremest case upon this point which has come to my notice in the direction of authorizing blanks to be filled after execution (Inhabitants of South Berwick *vs.* Huntress, 53 Maine R., 93 and 94, &c.,) expressly repudiates the idea that where there is an express agreement as to the amount of the penalty, &c., and that the bond shall be returned, if not filled and signed according to that stipulation, still such bond may be filled in violation and fraud of the agreement and be delivered so as to bind for four times the agreed amount. On the contrary, this case expressly declares that it only binds "when a party signs a bond and delivers it to another, *not* stipulating or expecting that the paper will be returned, or afterward exhibited to him, but be delivered to the obligee when perfected, and when he so delivers it there are blanks in it to be filled up before it can be perfected, and he knows the fact, those blanks may be filled up without any further knowledge or assent on his part—*provided* the insertions thus made do not change the relations of the parties or alter or vary the *actual agreement*, or create any new

liability, or *enlarge* any responsibility embraced in the contract between the parties, but only makes perfect in *writing* what was actually agreed upon."

The "dictum" in Drury *vs.* Foster (2 Wall., 33) contains no hint that the *express* authority to fill blanks may be violated and yet the deed be delivered and bind; but the dictum is exactly to the contrary.

The next question which we direct attention to is also one arising upon the demurrer.

The copy of the petition shows, on page 4, that the law required this bond should be executed by each signer in the presence of two witnesses, who must sign their names as witnesses. (See 4th regulation, indorsed on the copy of the bond on page 4.) By section 251, page 41, of Revised Statutes, the Secretary of the Treasury is expressly authorized to make this regulation, in the following language: "The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law," to be used under and in execution of the revenue laws. Hence it has the exact force it would have did a statute require this signature of plaintiff in error to be made in the presence of two witnesses who should witness it by their signatures.

We have, therefore, the question whether an instrument so required by law to be attested and witnessed, as to its execution, must be filled out at the time it is witnessed to be valid; or whether a mere printed blank may be executed and witnessed, and the most essential part be written out when no one is by, and yet that be a good execution of such statutory bond. If it be good, and the instrument is not worthless for the same reason that the deed was held worthless in Druery *vs.* Foster, (2 Wall., 24,) then it must be so only because the statute requiring

attestation is only directory, and the bond good without it. But if this be so, and if, moreover, *printed blanks* may be signed and attested by the witnesses, and bonds be written out *afterward* to suit obligees or principal, then not only some of the best principles which the common law applies to these instruments requiring these solemnities of execution have passed away, but the statutes controlling the methods of their execution have also perished. The pleas, which are confessed by the demurrer, show that if anybody did witness Judge Butler's signature it was but the witnessing of his execution of a *printed blank* and not a bond.

But we now come to another question which seems to us conclusive of this case.

The record shows, page 4, that under the authority of sec. 251 of revised statutes (see *supra*) the following law was, at the date of the making of this bond, in force as to what the bond should contain, and the law was indorsed on the back of the bond when it was accepted by the United States.

The following instructions must be particularly observed and complied with:

1st. The Christian names must be written in the body of the bond in full and so signed to the bond; and the residence of each signer (town or city, county and State) should be stated after his name in the body of the bond; and if it be in a city or large town, the street and number should be given.

On page 3 of the record it will be seen that this requirement of the law was wholly ignored and violated by the United States officers who took this bond so far as related to the insertion of the residence of each signer.

Here, then, the United States had notice that one requirement of the statute had been violated in taking this bond. It is very true that this fact may not *alone* vitiate

the bond. But so, also, did not the fact that the names of Simon Ingleman and William Patton were named on the face of the bond in Pawling *et al. vs.* United States, (9 Cranch, 219,) and were not signers therof, *alone* vitiate the bond in that case? That bond in that case would have been perfectly good against all the signers so far as *this* fact alone affected it. It was only because added to this fact was that other one, proved *aliunde*, that it was agreed the bond should not be delivered till these other two sureties signed, that this defect or imperfection of the bond was, in that case, held to discharge them who had a contract requiring the other two named on the face of the bond to sign. And so this court held in Dair *vs.* United States. (See 16 Wall., 5 and 6.) In other words, and to state the point according to the legal principle it involves, any defect or irregularity on the face of the bond *which connects itself with that subject matter which is set up as a defense puts the party who accepts the bond upon inquiry, and hence gives him notice of that which is connected with such apparent defect.*

Now apply this rule and the fact of the omission of the residences of securities to this case. What is the *reason* of this rule? Manifestly to insure the procurement of *responsible* sureties well known and of designated residence; and to avoid "straw" sureties. By the absence of residence, on the face of the bond, the United States were notified that one most important and salutary requirement of law was ignored; *that all the guarantee which its observance furnished of the goodness of each surety was lacking; that the danger of each security who was "good" was augmented; and that it was, therefore, the duty of the United States to inquire as to where and who these securities were, and whether each was good.* Had this been done then the United States would have found out that *two* of the secu-

rities were *insolvent;* and, no doubt, would have found out that contract which is set up in the first plea. That contract required that the sureties with Butler should reside in the District of Columbia, and should be worth $5,000 above all debts, &c. Butler's plea sets out this bond and *shows this defect*, and this, together with the evidence he offered, and which was excluded, shows and makes here available to him the error of the court in not allowing to him the benefit of the fact that the United States were, by the face of the bond, put upon inquiry as to those very facts which he sets up in his plea as a defense, to wit, as to where the sureties resided, and what they were worth.

Hence the United States were put on inquiry as to, and therefore, in law, had notice of the facts averred in said plea, namely, that the bond was not to be delivered unless two secretaries, besides Judge Butler, signed, who were residents of the District of Columbia, and worth $5,000 each above all debts.

On this ground, therefore, alone, if all other grounds fail, we insist this judgment must be reversed.

The suggestions now made cover about all the questions presented by this record which we care to mention, save that as to the judgment being rendered against Butler upon a verdict by a jury that is shown by the record to have been sworn to try the issue between the United States and another party, and not at all sworn upon that wholly different issue made by Butler's second plea, on which he was entitled to a verdict of a sworn jury.

Although this defect in the proceeding is not set out in the motion in arrest of judgment, yet it is fully disclosed by this record, is here assigned for error, and, we suppose, it is here available, and is certainly fatal to this judgment.

Since the writ of error "addresses itself to the court in its entirety, and not to any particular portion of it, as distinct from the residue, and hence any error may be assigned which is apparent on the record, whether it be made to appear in the bill of exceptions or in any other manner," (Suydam *vs.* Williamson, 20 How., 427,) therefore we are entitled to the benefit of this error disclosed by the record.

By SHELLABARGER & WILSON,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

RODERICK R. BUTLER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 192.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Brief for the defendant in error.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

RODERICK R. BUTLER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 192.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Brief for the defendant in error.

Debt on a joint and several internal-revenue bond executed by Benjamin B. Emory, as principal, and by Roderick R. Butler, Ethan A. Sawyer, and William Choppin, as sureties, in the sum of $15,000. Butler defended on the ground that at the time he signed and affixed his seal to the bond it was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; that the blanks were not filled, and there was no signature thereto, except Emory's; that Emory promised, if Butler would sign the bond, he would fill up the blanks with the sum of $4,000 and would procure two additional sureties in the District of Columbia, each of whom was to be worth $5,000; and that the bond was delivered to Emory with the under-

standing and agreement that the bond otherwise was not to be binding on the defendant, but was to be returned to him; that the defendant never afterward ratified or acknowledged the validity of the bond; that the other sureties did not reside in the District of Columbia, and were wholly insolvent and worthless; and that Emory obtained the signature by false and fraudulent representations. The circuit judge ruled that this was no defence to the action; a verdict was taken for the plaintiffs, and the defendant excepted and brought this writ of error.

Argument.

This case is substantially decided by Dair *v.* United States, 16 Wallace, 1, and cases there cited.

State *v.* Peck, 53 Maine, 284.

Hern *v.* Nichols, 1 Salk., 289.

C. H. HILL.
Assistant Attorney-General.